STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2003
v	No. 236013 Wayne Circuit Court
STACY BRUNER, Defendant-Appellant.	LC No. 00-003302

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and possession with intent to deliver more than 45 kilograms of marijuana, MCL 333.7401(2)(d)(iii). Defendant was sentenced to twenty-three months to twenty years in prison for the possession with intent to deliver cocaine conviction, and one to four years in prison for the possession with intent to deliver marijuana conviction.

I. Facts

In February 2000, police began conducting surveillance on Chapel Street in Detroit due to complaints about suspected narcotic sales. While sitting in an unmarked car in plain clothes, police were approached by a man[1] offering to find crack cocaine for them to purchase. The officers' response was that they wanted a $10 rock of crack cocaine. The unwitting man then introduced the officers to defendant, but defendant refused to sell them crack cocaine because he had never seen them before. The officers saw what appeared to them to be a clear plastic Ziplock bag of cocaine in defendant's hand during their conversation with defendant.

Further surveillance over the course of a few weeks revealed that defendant frequently went back and forth between the Chapel Street area and his home on Riverview. Police obtained a search warrant and on February 23, 2000, officers executed the warrant at the home on Riverview. Police walked up to the front door and shined a light into the house, and saw

[1] A police officer testified at trial that this man was unknown to police, and that police refer to such a person as an "unwitting;" thus, this individual will be referred to as "the unwitting man" or "unwitting informant" throughout this opinion.

defendant sitting on the couch. They shouted, "police, search warrant." Defendant then got up from the couch and ran toward the back of the house. Officers rammed the front door open and chased defendant through the kitchen where they observed defendant pull out a kitchen drawer and shut it. After the house was secured, the officers searched the kitchen drawer where they found two dinner plates containing cocaine weighing 21.40 grams. They also found two digital scales on the countertop, and cocaine residue just to the right of the scales. In the main closet, police found a sock with a little over $9,000 inside. In an upstairs bedroom, police discovered two freezer bags containing marijuana weighing 763.38 grams.

II. Analysis

A. Search Warrant

Defendant's first issue on appeal is that the trial court erred in finding that the magistrate had probable cause to issue a search warrant for defendant's home because the information the police officer relied on in her affidavit was "stale." We disagree. We review the trial court's factual findings in a ruling on a motion to suppress for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). To the extent a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo. *Id.* This Court must look at the affidavits and determine whether the information contained in the documents could have caused a reasonably cautious person to conclude that, under the totality of the circumstances, there was a substantial basis of probable cause to conclude that the evidence sought might be found in a specific location. *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000).

A search warrant may not issue unless probable cause exists to justify the search. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651; *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995); *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). Probable cause exists when the facts and circumstances would allow a person of reasonable prudence to believe that the evidence of a crime or contraband sought is in the stated place. *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000); *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001).

Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation. *Sloan*, *supra* at 167-168. When probable cause is averred in an affidavit, the affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs. The affiant may not draw his own inferences, but must state the matters which justify the inferences. *Id.* at 168-169; *Ulman*, *supra* at 509. However, the affiant's experience is relevant to the establishment of probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997).

While the passage of time is a valid consideration in deciding whether probable cause exists, the measure of the staleness of information in support of a search warrant rests on the totality of the circumstances, including the criminal, the thing to be seized, the place to be searched, and the character of the crime. *People v Russo*, 439 Mich 584, 605-606; 487 NW2d 698 (1992).

In her affidavit for a search warrant for defendant's Riverview home, the affiant, Officer Carmen Diaz, relied on several events as the basis for her belief that there was probable cause to search the premises for narcotics. The first incident occurred on February 10, 2000, at which time an unwitting man approached Diaz and Williams and informed them that defendant was the one to buy drugs from in the Chapel area. It is undisputed that the unwitting informant was never identified by name, and that the officers did not focus their attention specifically on defendant until after the unwitting man provided them with information regarding defendant's drug activity. However, probable cause may be founded on hearsay from an unnamed informant. MCL 780.653; *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991). MCL 780.653 provides, in relevant part:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
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> ***
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> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and *either* that the unnamed person is credible *or* that the information is reliable. [Emphasis added.]

Although the officer's lack of prior dealings with the unwitting man may raise a question regarding his credibility, the record indicates that there were facts sufficient to establish that the information provided by the unwitting man was reliable. Diaz averred in her affidavit that after she gave the unwitting man $10 to buy a rock of cocaine from defendant, she observed the unwitting man go directly over to talk to defendant, and then return immediately to where she and Williams were. When the unwitting man returned, he told Diaz that defendant only sold $50 rocks, and when Diaz agreed to pay that amount, the unwitting man told her that defendant was going to go to his (defendant's) house to pick up the cocaine. The officers were able to verify this information when Officer Pachowski followed defendant directly to defendant's residence on Riverview, where defendant stayed less than five minutes, and returned directly back to the Chapel location where Diaz and Williams were waiting. When defendant returned from Riverview, Diaz observed that defendant was holding a plastic bag of what she believed, based on her experience as a narcotics officer, to be cocaine. We conclude that, from these circumstances, the magistrate could have reasonably concluded that the details provided by the unwitting man regarding defendant's conduct were specific enough to indicate that he was speaking from personal knowledge. See *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). Furthermore, Officer Pachowski's independent surveillance of defendant as he left and returned to the Chapel location, along with Diaz' independent confirmation that defendant resided at the Riverview address, verified the information provided by the unwitting man, and served to establish the informant's reliability. See *Ulman*, *supra* at 509-510; see also *Harris*, *supra* at 425-426. Moreover, because police officers are presumptively reliable and self-authenticating details can establish reliability, the fact that Diaz personally observed defendant with suspected cocaine, and heard him say that he was not going to sell to her and Williams because he had not seen them before, provided further support for the conclusion that the

unwitting man had personal knowledge of information about defendant's drug activity, and that the information was reliable. See *Ulman, supra* at 509.

Contrary to defendant's assertion, although the February 10, 2000, incident provided an important foundation for Diaz' ultimate conclusion that there was probable cause to believe narcotics would be found in defendant's home, it was not the sole basis for the determination. Diaz affirmed that four days later, on February 14, 2000, she again set up surveillance, and observed defendant go to the suspected drug house on Chapel Street, stay about ten minutes, and then leave. Diaz then observed defendant repeat this same behavior at another house. Diaz also stated that on a third occasion, February 22, 2000, the day before the search warrant was issued and executed, she again set up surveillance. Once more, Diaz observed defendant go to the same Chapel location, return to Riverview within twenty minutes, stay at Riverview less than five minutes, and then return back to the same Chapel location. Based on her experience, Diaz found defendant's conduct to be characteristic of his method of illegal drug trafficking. Upon considering the totality of the circumstances involved on the three separate occasions on which Diaz conducted surveillance of defendant's conduct, the most recent occurring only one day prior to issuance of the search warrant, we hold that the information Diaz provided in support of the search warrant was not stale. After reviewing the affidavit in a common sense and realistic manner, and giving deference to the magistrate's conclusion, we hold that there was a substantial basis for the magistrate to determine that there was probable cause to believe that narcotics and other drug paraphernalia would be found at defendant's Riverview home. See *Whitfield, supra* at 448. We hold, therefore, that the search warrant issued for the Riverview premises was valid, and the items seized during this search were obtained lawfully.

B. Self Representation

Defendant's second issue on appeal is that the trial court failed to satisfy the requirements set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), because defendant's request to represent himself was not made unequivocally or voluntarily, and the court did not make a reasonable inquiry in order to make this determination. We disagree. We review a trial court's grant of a defendant's request to proceed in propria persona for an abuse of discretion. *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997).

A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by the Michigan Constitution and statute, Const 1963, art 1, § 13, MCL 763.1. *Martinez v Court of Appeals*, 528 US 152, 154; 120 S Ct 684; 145 L Ed 2d 597 (2000); *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996). Several requirements must be met before a defendant may proceed in propria persona. *Ahumada, supra* at 616. First, a defendant's request to represent himself must be unequivocal. *Adkins, supra* at 722; *Anderson, supra* at 367-368. Neither a request to proceed pro se with standby counsel nor a request to discharge appointed counsel is an unequivocal request by a defendant to represent himself. *People v Dennany*, 445 Mich 412, 446 (Griffin, J.), 458 (Boyle, J.); 519 NW2d 128 (1994). Second, the trial court must determine that the defendant's assertion of his right is knowing, intelligent, and voluntary. *Adkins, supra* at 722; *Anderson, supra* at 368. The existence of a knowing and intelligent waiver of counsel depends on the particular facts and circumstances of a case. *People v Riley*, 156 Mich App 396, 399; 401 NW2d 875 (1986). Every presumption should be made against waiver. *Adkins, supra* at 721. The court must make the defendant aware of the dangers and disadvantages of self-representation. *Id.* An explanation of

the risks of self-representation requires more than informing the defendant that he waives counsel at his own peril. *People v Blunt*, 189 Mich App 643, 649-650; 473 NW2d 792 (1991). Third, the trial court must determine that the defendant's self-representation will not disrupt, inconvenience or burden the court. *Dennany, supra* at 432 (Griffin, J.); *Anderson, supra* at 368. Fourth, the trial court must comply with the requirements of MCR 6.005. *Adkins, supra* at 722. A court may not permit the waiver of counsel without first advising the defendant of the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risks of self-representation and without offering the defendant the opportunity to consult with a lawyer. MCR 6.005(D), *Dennany, supra* at 433 n 13 (Griffin, J).

If the judge is uncertain with respect to whether any of the waiver procedures are met, he should deny the request to proceed in propria persona and note the reasons for the denial on the record. *Adkins, supra* at 727. The court should " 'indulge every reasonable assumption against waiver.' " *Id.* at 721, quoting *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 2d 1461 (1938).

A valid waiver of the right to counsel needs only substantial compliance with the requirements of *Anderson* and MCR 6.005. *Adkins, supra* at 726-727. Substantial compliance requires that "the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id.*

Upon examination of the record, we conclude that the trial court substantially complied with the requirements of the case law and court rule. Defendant requested to represent himself at trial, claiming that he felt that his appointed counsel was incompetent to try the case against a seasoned trial attorney. Even after the trial court made it clear that it was not going to adjourn the trial anymore, defendant stated that he wanted to represent himself. Defendant was informed of the charges and possible sentences, as well as the dangers of self-representation. The court also made it clear that defendant had the option of being represented by his appointed counsel, who was present and ready to proceed, if defendant so desired. As the trial court discussed each requirement of *Anderson* and MCR 6.005, defendant repeatedly expressed an understanding regarding each aspect of the discussion. Defendant's only expression of any lack of understanding came in the same statement in which he informed the court that he had a conflict of interest with his appointed counsel. However, once the court made it clear that it was not going to adjourn the trial again as had been done several times in the past so defendant could get a new lawyer, defendant once again expressed an unequivocal desire to represent himself.

Defendant contends that his request to represent himself was not voluntary since he was forced to represent himself because the court would not grant him an adjournment to retain his own counsel. We conclude that defendant's conduct of insisting, on at least two prior occasions over the period of a year, that the trial court delay the trial so that he could obtain new counsel, indicates that defendant's initial decision to waive the right to counsel was both voluntary and unequivocal, and was a part of his attempt to manipulate the proceedings. Defendant reaffirmed his desire to represent himself after the court explained that it was not going to postpone the trial, and after defendant was reminded about the risks of representing himself. We hold, therefore, that the trial court complied with the requirements of *Anderson* and MCR 6.005 by inquiring and determining that defendant's request to represent himself was unequivocal, voluntary, knowing and intelligent.

C. Trial Court's Comments and Conduct

Defendant's third issue on appeal is that the trial court erred in making demeaning comments about defendant to the jury and in failing to remain impartial during defendant's trial. Defendant failed to properly preserve this issue for appellate review by objecting to the trial court's conduct in the lower court; therefore, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988), quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975); see also *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *Paquette, supra* at 340; *Collier, supra* at 698. Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather, the record should be reviewed as a whole. *Id.*

Defendant argues that the following introductory remarks by the trial court to the prospective jury denigrated him in the eyes of the jury:

> I anticipate this will not be a long and involved complicated kind of case *in spite of the circumstances that will address you* here in a minute.

Defendant contends that this comment represents an inappropriate reference by the trial court to defendant being a circumstance or "thing." The record provides no support for defendant's interpretation of the court's comment. In fact, our review of the record reveals that the court made this comment to the jury during the course of its discussion about jury duty. In an effort to make the impending task of jury duty appear less burdensome to those potential jurors uninterested in serving on the jury, and to discourage them from making up excuses to avoid being chosen for the jury, the trial court explained it did not expect the case to take much time, despite the situation at hand. Therefore, we conclude that the court was not referring to defendant as a circumstance, and that there is no evidence in the record to support such a conclusion.

Defendant also argues that the court improperly informed the jury that defendant was a "fool." During an explanation to the jury of the right of self-representation, the court stated, in relevant part:

> And I'm sure that some of you have heard that old (inaudible) about the *person representing themselves has a fool for a client* (emphasis added).

Again, there is nothing in the record indicating that the court was referring specifically to defendant as a fool. Rather, the court was simply reciting the well-known adage that a person who acts as his own attorney has a fool for a client. We hold that the court's purpose in making this comment was to make sure that the jurors would be able to distinguish between the sentiment expressed in the popular saying, and their duty not to allow the fact that defendant was representing himself affect how they viewed the case one way or another.

Defendant further argues that the trial court pierced the veil of impartiality by repeatedly making objections and comments to defendant sua sponte. When viewed in context in which they were made, this writer opines that the court did not demonstrate partisanship or unjustifiably arouse suspicion in the mind of the jury concerning a witness' credibility. See *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Rather, the court interjected objections and evidentiary rulings that were necessary to compel defendant's compliance with the same basic rules with which a licensed attorney would be expected to comply. The trial judge was acting within the scope of his authority in controlling the proceedings. We hold, therefore, that there was no plain error that affected defendant's substantial rights. See *Carines*, *supra* at 763.

Next, defendant contends that the trial court unfairly, and without a legal basis, refused to allow defendant's standby counsel to take over the trial on the second day. Contrary to defendant's assertion, the law does not require a trial court to permit a "hybrid" representation of defendant's case.[2] Rather, the trial judge has within his or her sound discretion the decision of whether to give a defendant the opportunity to have counsel appear before the court or jury. *Dennany, supra* at 440. "A defendant does not have a constitutional right to choreograph special appearances by counsel." *Id.* Therefore, we conclude that the trial court neither abused its discretion nor pierced the veil of judicial impartiality, and therefore, no miscarriage of justice occurred. We hold that none of the trial court's comments or conduct were of such a nature as to unduly influence the jury, and thus, defendant was not deprived of his right to a fair and impartial trial.

E. Prosecutorial Misconduct

Defendant's final issue on appeal is that the prosecutor took unfair advantage of the fact that defendant was representing himself by improperly introducing inadmissible prejudicial hearsay testimony. Generally, we review claims of prosecutorial misconduct on a case by case basis, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context to determine whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). However, because defendant failed to preserve his claim of prosecutorial misconduct, we review for plain error. *Id.* In order to avoid forfeiture of an unpreserved claim, a defendant must demonstrate plain error which was outcome determinative. *Id.*

Hearsay is a statement, other than the one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992). Hearsay evidence is inadmissible unless there is a specific exception allowing for its introduction. *Meeboer*, *supra* at 322. Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy. *Id.*

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[2] "Hybrid representation" describes an arrangement whereby both the defendant and his attorney would conduct portions of his trial and share joint presentation of his defense, while the defendant retains ultimate control over defense strategy. *Dennany, supra*, 445 Mich 440, citing *State v Gethers*, 497 A2d 408 (Conn, 1985).

Specifically, defendant alleges the prosecutor elicited from the officers' testimony about there having been numerous complaints about drug activity on Chapel Street, and that the unwitting informant had advised them that defendant sold drugs in that area.

With respect to Officer Williams' testimony regarding complaints about narcotic locations on Chapel Street, our review of the record establishes that the statement was not offered for its truth, and therefore, did not constitute hearsay. Rather, we conclude that the statement was offered to explain the purpose for the officers being on Chapel Street that day, and how the ultimate criminal investigation and search of defendant's Riverview home came about. *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993). Since the statement was offered for a non-hearsay purpose, we hold that defendant has failed to show that the prosecutor committed prosecutorial misconduct by introducing the testimony.

Even assuming the contested statement would have been deemed hearsay, prosecutorial misconduct cannot be predicated on the good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *Id.* at 660-661. In this case, defendant has not demonstrated bad faith on the part of the prosecutor or how he was prejudiced by the admission of the testimony. See *id.* Therefore, we hold that defendant's assertion that the prosecutor committed prosecutorial misconduct on this basis is without merit.

Regarding the officers' testimony that the unwitting man told them that defendant supplied most of the drugs in the Chapel Street area, we agree that this statement was hearsay, as it was offered for its truth. However, a thorough review of the record reveals that the two exchanges defendant cites to in support of his contention that the prosecutor inappropriately introduced this hearsay testimony occurred during defendant's cross-examination of the officers, not during the prosecutor's questioning. In both instances, defendant invited the officers' hearsay testimony by asking open-ended questions. It is well settled that this Court will not address allegations concerning invited error on appeal. See *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998); see also *People v Amison*, 70 Mich App 70, 75; 245 NW2d 405 (1976). There is no evidence that the prosecutor played any role in eliciting the now-contested hearsay testimony. In fact, the record indicates that the prosecutor prudently performed her direct examination of the officers, and was careful not to frame her questions in a way that would elicit inadmissible hearsay testimony. We hold, therefore, that defendant has failed to show that the prosecutor committed plain error that affected his substantial rights.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Bill Schuette